

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
STEVEN DONALD WEST and) CASE NO. 12-22606 jpk
LORRAINE ELIZABETH WEST,) Chapter 13
Debtors.)

ORDER CONCERNING FURTHER PROCEEDINGS
IN RELATION TO CONFIRMATION OF A CHAPTER 13 PLAN

This Chapter 13 case came before the court for a confirmation status conference on March 11, 2013. The debtors appeared by counsel, Andrew J. Kopko; the Chapter 13 Trustee appeared by counsel, Julia Hoham. The March 11, 2013 conference was scheduled pursuant to the court's record No. 34 order, which stated issues to be addressed to the court at the March 11, 2013 hearing.

First, a bit of background in the case. The case was initiated by a Petition filed on July 11, 2012. The initial Chapter 13 plan of the debtors was filed as record No. 14 on July 23, 2012. Paragraph 10 of that plan provided for a "strip" of a mortgage interest of Fifth Third Bank with respect to the debtors' residential real estate. On November 21, 2012, the debtors – by counsel – filed an amended Chapter 13 plan as record No. 27, a plan which did not in any manner refer to any interest of Fifth Third Bank with respect to the debtors' residential real estate.¹ As noted by record entry No. 25, the debtors are not entitled to receive a discharge under 11 U.S.C. § 1328 in this Chapter 13 case. Proper notice of the record No. 27 amended plan was provided to Fifth Third Bank and all other creditors and parties-in-interest, and no objection to confirmation was filed. As record No. 34, the court entered an order stating its concerns with respect to the amended plan, concerns which were addressed at the preliminary pretrial conference/status conference held on March 11, 2013.

¹ Fifth Third Bank has not filed a timely proof of claim with respect to any interest it may have in this real estate.

The issues presented by the first amended plan are extremely complicated. As a result of a prior Chapter 7 case, the debtors have discharged their in personam obligations to First Financial Bank and to Fifth Third Bank, but have not affected the liens held by those creditors with respect to the debts subject to those creditors' security interests. These obligations are in fact secured by a security interest in the debtors' principal residence, and therefore the treatment of those debts may well involve application of 11 U.S.C. § 1322(a)(2). The amended plan proposes to deal with indebtedness owed to First Financial Bank essentially pursuant to 11 U.S.C. § 1322(b)(5), but it does not in any manner provide for the lien interest of Fifth Third Bank. At hearings held with respect to confirmation of the amended plan, Attorney Kopko stated that an appraisal obtained by the debtors established that the value of the subject residence precluded a "stripping" of the second mortgage interest of Fifth Third Bank, because there was equity for that lien interest with respect to that property. Attorney Kopko stated that the intent of the second amended plan was to do nothing with respect to the lien interest of Fifth Third Bank, but to recognize that whatever lien interest there might be (with respect to whatever indebtedness there might be with respect to that lien interest) would pass through the bankruptcy case unaffected and remain subsequent to conclusion of the case. The primary problem presented by the first amended plan is that this stated intent is in no manner stated in the first amended plan – failing to state anything in relation to the lien interest of Fifth Third Bank does not adequately provide that creditor with an opportunity to review the plan in relation to the debtors' stated intention in relation to it. An amended plan must be filed which specifically designates the treatment of the lien interest of Fifth Third Bank which the debtors propose. Until that treatment is proposed in a plan which the court can review as providing adequate notice to Fifth Third Bank of its treatment, the court will not express any position on whether a "pass through" of whatever lien interest Fifth Third Bank may have with respect to the

subject real estate – without in any manner dealing with that interest – satisfies confirmation requirements required by the United States Bankruptcy Code.²

IT IS ORDERED that confirmation of the record No. 27 first amended plan is denied.

IT IS ORDERED that the debtors shall file an amended plan which specifically provides for some treatment of the lien interest/security interest of Fifth Third Bank by May 10, 2013.

² Without in any manner taking any position or deciding anything in relation to any proposed treatment of Fifth Third Bank, the court notes:

1. The underlying in personam obligation to both First Financial Bank and Fifth Third Bank has been discharged in a prior Chapter 7 case.

2. The debtors are not entitled to any form of discharge in this Chapter 13 case.

3. First Financial Bank has filed a proof of claim in this Chapter 13 case; Fifth Third Bank has not filed a proof of claim.

4. Whatever lien interest First Financial Bank and Fifth Third Bank had in the subject real estate survived discharge in the debtors' Chapter 7 case and "passed through" unaffected by that case/discharge. However, the value of that lien interest is not so clearly determined.

5. Absent the filing of a proof of claim in the Chapter 13 case, no creditor can receive distribution under any plan proposed by the debtors.

6. An issue arises as to the extent and nature of the "security interest" held by both First Financial Bank and by Fifth Third Bank in the debtors' residential real estate for the purposes of 11 U.S.C. § 1322(b)(2). That issue involves a consideration of whether the discharge of the underlying obligations owed to those creditors eviscerates any schedule of payments with respect to the underlying obligation; whether those obligations now are security interests/liens which are essentially immediately due for the purposes of this Chapter 13 case; and resultingly, the effect of 11 U.S.C. § 1322(c)(2) on the treatment of those security interests. In turn, the foregoing analysis requires analysis of a Chapter 13 plan's treatment of secured debts which are potentially no longer subject to the cure provisions of 11 U.S.C. § 1322(b)(5), but can be "crammed down" pursuant to 11 U.S.C. § 1322(c)(2)/11 U.S.C. § 1325(a)(5).

7. 11 U.S.C. § 1325(a)(5) involves the concept of an "allowed secured claim", which may/or may not involve consideration of 11 U.S.C. § 502(a) with respect to the filing of a proof of claim. If so, Fifth Third Bank cannot have an "allowed secured claim" because it has not filed a proof of claim; First Financial Bank has an "allowed secured claim" because it has filed a proof of claim.

Isn't this case just too much fun? As attorneys who were required to take a course on Constitutional Law in law school, and who have read numerous decisions of the United States Supreme Court since graduation from law school – know: It is an institutionalized, and perhaps Constitutionally mandated exercise – that a Federal Court will not decide issues not directly presented to it, and will not issue advisory opinions as to what might happen if those issues were directly presented. What more appropriate posture could a subordinate federal court like the United States Bankruptcy Court for the Northern District of Indiana take than to emulate the Supreme Court of the United States? The answer is – none. In keeping with what is essentially the "ripeness" doctrine applicable to federal courts, this court will at this point decide nothing as to all of the issues outlined above. However, this court will determine that the record No. 27 amended plan cannot be confirmed because it does not provide any treatment of the lien interest/security interest of Fifth Third Bank.

IT IS FURTHER ORDERED that a confirmation status conference will be held on **May 13, 2013, at 3:00 P.M.**³

Dated at Hammond, Indiana on April 17, 2013.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee

³ An additional matter necessitates addressing. All addresses for notices to Fifth Third Bank in this Chapter 13 case have been those provided by the debtor. However, in Case No. 09-22289, Fifth Third Bank provided an address for service notices in relation to that case upon it. This address has not been utilized by the debtors with respect to Fifth Third Bank in this case. With respect to the amended plan to be filed by the debtors and any service of the court's order with respect to that plan, the debtors must utilize – in addition to whatever other addresses they deem appropriate – the address for Fifth Third Bank stated in record No. 9 in Case No. 09-22289.